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Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

RICHARD C. REMUS, TRUSTEE FOR
SUPERIOR METAL SHREDDERS, INC.,
Petitioner,

v.

CITY OF KALAMAZOO,
Respondent.

On Petition For A Writ of Certiorari
From The United States Court of Appeals
For The Sixth Circuit

APPENDIX TO PETITIONER'S PETITION FOR WRIT OF CERTORARI

Theo. P. Hentchel
Counsel of Record
165 Capital Avenue N.E.
Battle Creek, MI 49017
(616) 962-4841

Attorney for Petitioner

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INDEX FOR APPENDIX

	Page
Opinion of Sixth Circuit Court of Appeals	A1
Judgment of District Court	A12
Opinion of District Court	A14
Opinion of Michigan Court of Appeals	A24
Denial of Application to Michigan Supreme Court	A28
Respondent Correspondence of November 21, 1979	A29
Letter of Edison Neighborhood Council	A30
Petitioner's Counter-Complaint in State 1980 Case	A32
8 Page Summary of Events of Petitioner's Predecessor and Owner of Shredder	A35
U.S. Constitution, Amendment 5	A43
U.S. Constitution, Amendment 14	A44

U.S. Constitution,
Article 5, Section 1 . . . . . A45

Title 28, § 1738
(Full Faith and Credit) A46

Title 42, § 1983 . . . . . A47

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 96-2200

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD C. REMUS, TRUSTEE FOR SUPERIOR METAL SHREDDERS, INC.,

Appellant,

v.

CITY OF KALAMAZOO,

Appellee.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

PER CURIAM. Richard C. Remus, bankruptcy trustee for Superior Metal Shredders, Inc., appeals the district court's grant of the City of Kalamazoo's motion for summary judgment and dismissal of his "takings" claim under the doctrine of res judicata. For the reasons set forth below, we **AFFIRM** the lower court's decision.

I.

Superior Metal Shredders, a recycling and salvage company, operated an automobile shredder in the City of Kalamazoo. Superior continued to operate the shredder even after the City revoked its license.

The 1980 State Court Action

In 1980, the City brought a state court action against Superior to enjoin it from operating the shredder without a license. Superior filed a counter-complaint alleging that the City's revocation of its license violated its rights under the Michigan and United States Constitutions. Superior also alleged that the City had "unreasonably and unjustly, arbitrarily and without cause harassed [Superior] and caused the shut-down of [Superior's] business activities to the extent that [Superior] ha[s] found it necessary to submit to reorganization." (J.A. 133) In fact, Superior did file for bankruptcy on October 4, 1980. In September 1984, Superior's Chapter 11 bankruptcy petition was converted to a Chapter 7 liquidation proceeding, and the bankruptcy court appointed Richard C. Remus as bankruptcy trustee.

On October 15, 1984, the state court issued a permanent injunction prohibiting superior from operating the shredder. The court dismissed the City's action, including Superior's counter-complaint, with prejudice. Neither David Rosenberg, the former owner and sole shareholder of Superior, nor trustee Remus appealed this decision. Through the bankruptcy court proceedings, superior was dissolved and the assets of the company sold to an unrelated third party, Kalamazoo Metal

Recycling, Inc.

The First Federal District Court Action

Rosenberg then filed an action in United Stated district court, alleging that the City deprived him of property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 10, Section 2 of the Michigan Constitution. Upon the City's motion, the district court dismissed the complaint for lack of subject matter jurisdiction pursuant to Williamson County Regional Planning Commission v Hamilton Bank of Johnson City, 473 US 172 (1985). Williamson holds that a property owner cannot claim a violation of the takings clause until it has used any available adequate state procedures for obtaining just compensation and been denied such compensation. Id. at 186-87. The district court found that Superior had not pursued available state procedures to obtain compensation, and thus held that Superior's takings claim under the federal Constitution was not ripe for adjudication. Accordingly, the district court, in an order dated January 6, 1989, dismissed this claim and Superior's pendent claim under the Michigan Constitution.

The 1989 State Court Action

In September 1989, trustee Remus

filed an action in Michigan state court alleging that the City had taken Superior's property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 10, Section 2 of the Michigan Constitution. The trial court found that Superior either had raised the claims, or could have raised them in the 1980 state court action. Accordingly, the court held that the action was barred by the doctrine of res judicata and granted the City's motion for summary judgment. The Michigan Court of Appeals affirmed the trial court and denied Remus' subsequent motion for a rehearing, and the Michigan Supreme Court denied leave to appeal. Remus then filed a petition for writ of certiorari with the United States Supreme Court. However, when Remus failed to cure certain defects in the petition, it was ultimately rejected and never docketed.

Proceedings Below

On July 26, 1995, Remus brought the present suit in federal district court pursuant to 42 U.S.C. §1983, alleging that the City deprived Superior of its property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In response, the City filed a motion to dismiss and for summary judgment. On August 15, 1996, the district court issued an opinion and a

judgment order, granting the City's motion and dismissing Remus' claim on the ground that it was barred by the doctrine of res judicata. The court based this ruling on the full faith and credit provision of 28 U.S.C. §1783, which mandates that federal courts give a prior state court adjudication the same effect it would have in state court. The court found that Michigan courts had determined that the 1989 state court action was barred by the doctrine of res judicata, and thus ruled that because the present suit was virtually identical to the 1989 state court action, res judicata acted to bar the current suit. Finally, the district court rejected Remus' claim that the state courts had wrongly decided the res judicata issue, stating that only the United States Supreme Court may review the state courts' determination. This appeal timely followed.

II.

This Court reviews a district court's grant of summary judgment de novo, applying the same test as that used by the district court in reviewing a motion for summary judgment. Barnhart v Pickrel, Schaeffer & Ebeling Co., 12 F.3d 1382, 1388 (6th Cir. 1993) (quotations and internal citations omitted). Summary judgment is appropriate when the record reveals that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v

Catrett, 477 U.S. 317, 322-23 (1986).

In reviewing a motion for summary judgment, this Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirements that there be no genuine issue of material fact." Id. at 247-48 (emphasis in original). Thus, once the movant has satisfied its initial burden of demonstrating that the non-movant has no evidence to support an essential element of its case, the non-movant must respond by presenting evidence that demonstrates a genuine issue of material fact. A mere "scintilla" of evidence is insufficient to withstand summary judgment. Id. at 252. Finally, this Court must affirm the lower court's grant of summary judgment if it is correct for any reason, even one that the lower court did not consider. Silver v Franklin Township Bd. of Zoning Appeals, 966 F.2d 1031 (6th Cir. 1992).

The district court found that Remus' claim was barred by the doctrine of res judicata. On appeal, Remus argues that the district court improperly applied the full faith and credit clause of 28 U.S.C. §1783 to reach this conclusion. Upon

review of the case, however, we find no reason to disturb the district court's finding. Section 1783 of Title 28 of the United States Code requires that federal courts give state court decisions the same full faith and credit that they would receive "in the courts of such state". Thus, a prior state court adjudication has the same effect in federal court as it would in state court. Marrese v Am. Academy of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985).

The doctrine of res judicata applies to claims premised upon 42 U.S.C. §1983 that were previously litigated in state court. Migra v Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Under Michigan law, res judicata, or claim preclusion, prevents a plaintiff from litigating a claim that actually was litigated or could have been litigated in an earlier proceeding. Eliason Corp. v Bureau of Safety & Regulation of Michigan Dept. of Labor, 564 F.Supp. 1298 (W.D. Mich. 1983). Under the doctrine, a subsequent legal action is barred if: (1) the parties or their privies are the same; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior judgment was a final judgment on the merits; and (4) the two suits involve the same cause or causes of action that are brought, or could have been brought, in the prior litigation. Allen v McCurry, 449 U.S. 90, 94 (1980); Brownridge v Michigan Mut. Ins. Co., 115 Mich App 745,

748-49 (1982).

The district court properly gave full faith and credit to the Michigan circuit court's res judicata determination, as the elements of the doctrine have been met in this case. First, the parties in the two state court actions are properly treated as the same; trustee Remus possesses only those rights possessed by the debtor-corporation and "the trustee stands in the shoes of the debtor", Superior. Matter of Light, 23 B.R. 482, 484 (Bankr. E.D. Mich. 1982). Second, there is nothing to suggest that the Michigan circuit court lacked jurisdiction to hear Remus' claim.

Third, the circuit court's 1984 dismissal of Superior's claim with prejudice constitutes a final judgment on the merits for purposes of applying res judicata. Brownridge, 115 Mich App at 748. A trial, witnesses, or a written opinion are not necessary so long as the parties have had an opportunity to be heard. See e.g., Eliason Corp., 564 F. Supp. at 1301 (holding that a dismissal for lack of progress can constitute adjudication on the merits, where there was "individualized consideration, in which the trial court considers all the pertinent circumstances of a particular case . . .").

Fourth, the present suit involves the same cause or causes of action that were brought, or could have been brought, in prior litigation. Indeed, Remus' current argument - that the City, by regulating

Superior's operation of the shredder, rendered it economically unviable and thus "took" Superior's property - is the same contention raised by Superior in its 1980 counter-complaint and in the 1989 state court action. In Michigan, "[t]he test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions." Jones v State Farm Mut. Auto Ins. Co., 202 Mich. App. 393, 401 (1993) (internal citation omitted). It is irrelevant whether the grounds asserted for relief are similar. Id. at 401.

The plaintiff in this case raises no new theories of liability and offers no new facts or evidence in support of this most recent action. The cases thus involve the same matter or issue; the very words in the complaint are identical to his earlier effort, duplicated verbatim into the current complaint. The district court was therefore correct in holding that Remus' claims were barred by res judicata.

Moreover, even if Remus' current claim is viewed as being different from Superior's 1980 counter-complaint, Superior easily could have raised a pure "takings" claim during either or both of the prior proceedings. The City argued, and the Michigan courts concluded in 1990, that Superior raised a takings claim in the prior (1980) suit by alleging, in its

counter-complaint, that the City's "unreasonable" and "arbitrary" regulation of the shredder "caused the shut down of [its] business activities." That counterclaim was dismissed with prejudice by the state court and Remus is therefore barred from relitigating it here. However, even if this Court concludes that Superior did not raise a takings claim in the first state court action, Remus' action is still barred by the doctrine of res judicata under Michigan law because Superior could have and should have raised a takings claim in that prior action.

Remus also argues that the state courts wrongly decided the res judicata issue, and thus that the district court improperly granted full faith and credit to their decision on that issue. It is, however, well settled that only the United States Supreme Court may review a determination of a state's highest court. In re Sun Valley Foods Co., 801 F.2d 186, 189 (6th Cir. 1986). A United States district court "has no authority to review final judgments of a state court in judicial proceedings." Id. (quoting District of Columbia Court of Appeals v Feldman, 460 U.S. 462, 482 (1983).

In addition, Remus argues that the federal constitutional claim asserted in his 1989 state court action was not ripe. However, Remus had the opportunity to litigate the question of ripeness in state court, he raised at least some of his ripeness arguments there, and the Michigan

Court of Appeals addresses this issue. Remus therefore may not collaterally attack the state court's determination. Ins. Corp. of Ireland, Ltd. v Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment.").

III.

Accordingly, we hold that the district court properly found the present suit barred by the doctrine of res judicata, and hereby **AFFIRM** the district court's grant of the City's motion for summary judgment and dismissal of Remus' claim.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD C. REMUS, TRUSTEE FOR SUPERIOR METAL SHREDDERS, INC.,

File No. 4:95-CV-136

Plaintiff,

Hon. Benjamin F. Gibson

v.

THE CITY OF KALAMAZOO,

Defendant.

JUDGMENT

_____/

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan this 15th day of August, 1996.

PRESENT: HON. BENJAMIN F. GIBSON,
U.S. DISTRICT JUDGE

In accordance with the Opinion entered this date,

IT IS HEREBY ORDERED that defendant's motion to dismiss and motion for summary judgment (pleading no. 7) is GRANTED.

IT IS FURTHER ORDERED that JUDGMENT is granted for defendant the City of Kalamazoo and against plaintiff Richard C. Remus, Trustee for Superior Metal Shredders, Inc.

IT IS SO ORDERED.

Benjamin Gibson
US District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD C. REMUS, TRUSTEE FOR SUPERIOR METAL SHREDDERS, INC.,

Plaintiff,

File No. 4:95-CV-136

Hon. Benjamin F. Gibson

v.

THE CITY OF KALAMAZOO,

Defendant.

OPINION

---/

Richard C. Remus, bankruptcy trustee for Superior Metal Shredders, Inc. ("SMS"), brings this action against the City of Kalamazoo ("the City") pursuant to Title 42 United States Code Section 1983, alleging that the City deprived SMS of its property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In response, the City requests that the Court dismiss the complaint or enter summary judgment in its favor. For the following reasons, the Court will grant the city's motion.

I.

A.

SMS, a recycling and salvage company,

operated an automobile shredder in the City of Kalamazoo. After the City revoked SMS's license, SMS continued to operate the shredder. In 1980, the City brought a state court action against SMS to enjoin its operation of the business without a license and to abate a nuisance. SMS filed a counter-claim alleging that in revoking the license the City violated SMS's rights under the Michigan And United States Constitutions. Counter-claim at ¶ 8. SMS further alleged that the City had "unreasonably and unjustly, arbitrarily and without cause harassed Counter-Plaintiff and caused the shut-down of Counter-Plaintiffs' business activities to the extent that the Counter-Plaintiffs have found it necessary to submit to Federal Bankruptcy Court for the purpose of corporate reorganization." Counter-claim at ¶ 10.

In September 1984, upon motion of SMS's creditors, SMS's Chapter 11 petition was converted to a Chapter 7 liquidation proceeding. The Bankruptcy Court appointed Richard Remus bankruptcy trustee.

On October 15, 1984, the state court issued a permanent injunction, prohibiting operation of the shredder. The court dismissed the action, including SMS's counter-claim, with prejudice. Neither David Rosenberg, the former owner and sole shareholder of SMS, nor trustee Remus appealed this decision.

SMS was dissolved and Remus sold the

company's assets. Thereafter, Kalamazoo Metal Recycling, Inc., an unrelated company, purchased the assets from the first purchaser. Upon Kalamazoo Metal Recycling, Inc.'s motion, and over the City's objection, the state court dissolved the permanent injunction, allowing that company to operate the shredder.

B.

Rosenberg then filed an action in this Court, alleging that the City deprived him of property without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 10, Section 2 of the Michigan Constitution. Upon the City's motion, the court dismissed the complaint for lack of subject matter jurisdiction under Williamson County Regional Planning Comm'n v Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

To review the applicable law, the Fifth Amendment proscribes governmental taking of private property without just compensation. [1] No federal constitutional violation occurs until just compensation

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1"The Fifth Amendment provides 'nor shall private property be taken for public use, without just compensation.' The Fifth Amendment prohibition applies against the States through the Fourteenth Amendment." McDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 342 n.1 (1986) (citations omitted).

is denied. A federal takings claim becomes ripe only after a claimant has used the available state procedure and has been denied just compensation. Williamson, 473 U.S. at 195; see also Bigelow v. Michigan Dep't of Natural Resources, 970 F.2d 154, 158 (6th Cir. 1992); Macene v. MJW, Inc., 951 F2d 700, 704 (6th Cir. 1991).

Plaintiff had not pursued the available state procedure and so had not been denied just compensation. Therefore, plaintiff's takings claim under the federal Constitution was not ripe for adjudication. Accordingly, on January 6, 1989, the Court dismissed the federal claim and plaintiff's pendent claim under the Michigan Constitution.

In September 1989, bankruptcy trustee Remus filed a state court action against the City alleging a taking without just compensation, under both the state and federal Constitutions. The state court complaint included two counts: Count I, State Taking; and Count II, Federal Taking. In his state court complaint, plaintiff alleged as follows:

> This is an action to redress the deprivation under color of the City of Kalamazoo's local ordinance of a privilege secured to the Plaintiff under the 5th Amendment to the United States Constitution and 14th Amendment to the United States Constitution and under Article

> 10, Section 2 of the Michigan Constitution of 1963 for a taking of private property by the Defendant, City of Kalamazoo, without just compensation, a right and privilege afforded to all persons within the jurisdiction of the United States and the State of Michigan.

The state trial court found that plaintiff either had raised the claims, or could have raised them in the 1980 state court action. Accordingly, the court held that the action was barred by res judicata and granted the City's motion for summary disposition. The Michigan Court of Appeals affirmed. After the Michigan Court of Appeals denied plaintiff's motion for a rehearing, the Michigan Supreme Court denied leave to appeal. Plaintiff did not file a petition for writ of certiorari with the United States Supreme Court.

Thereafter, plaintiff filed the instant action pursuant to Title 42 United States Code Section 1983, alleging that the City deprived SMS of its property without just compensation, in violation of the federal Constitution. In his complaint, plaintiff alleges as follows:

> This is an action to redress the deprivation under color of the City of Kalamazoo's local ordinance of a privilege secured to the plaintiff under the 5th

Amendment to the United States Constitution and the 14th Amendment to the United States Constitution for a taking of private property by the defendant, City of Kalamazoo, without just compensation, a right and privilege afforded to all persons within the jurisdiction of the United States.

Paragraph 3.

In response to the complaint, the City argues that this action is barred both by the doctrine of res judicata and by the statute of limitations.

II.

In reviewing defendants' request for dismissal, the Court must accept as true the material allegations in plaintiff's complaint. Summit Health Ltd. v. Pinhas, 500 U.S. 322, 325 (1991). The Court must construe the complaint in the light most favorable to plaintiffs. However, the Court is not required to accept as true plaintiffs' legal conclusions or any unwarranted factual inferences. See Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c); Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc., 862 F2d 597, 601 (6th Cir. 1988). In ruling on a motion for summary judgment, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

III.

The City first argues that plaintiff's claim is barred by the doctrine of res judicata. Title 28 United States Code Section 1738 requires that federal courts give state court decisions the same full faith and credit that they would have "by law or usage in the court of such State." Thus, a prior state court adjudication has the same effect in federal court as it would in state court. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). The doctrine of res judicata applies to claims premised upon Title 42 United States Code Section 1983 which previously were litigated in state court. Migra, 465 U.S. at 81-85.

Under Michigan law, res judicata or claim preclusion prevents a plaintiff from litigating a claim that actually was litigated or court have been litigated in an earlier proceeding. Ellison Corp. v.

Bureau of Safety & Regulation of Michigan Dep't of Labor, 564 F. Supp. 1298 (W.D. Mich. 1983); Gose v. Monroe Auto Equipment Co., 409 Mich. 147, 294 N.W.2d 165 (1980); Carter v. Southeastern Michigan Transp. Authority, 135 Mich. App. 261, 351 N.W.2d 920, 921 (1984). Claim preclusion requires that: (1) the cause of action of the first and second suits must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must be on the merits. In re Pardee, 190 Mich. App. 243, 475 N.W.2d 870, 873 (1991).

First, plaintiff asserted a takings claim under the federal Constitution in the 1989 state court action; he asserts the same claim here. Second, the parties to the actions are the same. Third, the state courts determined that the 1989 stat court action was barred by the doctrine of res judicata.

Plaintiff now argues that the state courts wrongly decided the res judicata issue. However, only the United States Supreme Court may review the state courts determination. In re Sun Valley Foods Co., 801 F2d 186, 189 (6th Cir. 1986) (citations omitted). This court "has no authority to review final judgments of a state court in judicial proceedings." Id. (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). "This is true, even though the state court judgment may have been erroneous." Id. (citations omitted).

Similarly, plaintiff argues that the federal constitutional claim that he asserted in 1989 state action was not ripe. However, plaintiff had the opportunity to litigate the question of ripeness in state court, he raised at least some of his ripeness arguments, and the Michigan Court of Appeals addressed this issue. Plaintiff may not collaterally attack the state court's determination. Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment."); Welch v. District Court, 215 Mich. App. 253, 545 N.W.2d 15, 17 (1986) (citing In re Hatcher, 443 Mich. 426, 505 N.W.2d 834 (1993) ("A party may collaterally attack or challenge subject matter jurisdiction only on direct appeal."); Auditor General v. Olezniczak, 302 Mich. 336, 4 N.W.2d 679 (1942). Accordingly, the Court finds that the instant action is barred by the doctrine of res judicata.[2]

For the reasons set forth above, the Court will grant the City's motion to dismiss or for summary judgment.

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[2]Because the Court so finds, the Court will not discuss defendant's arguments based upon the statute of limitations.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: August 15, 1996

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD C. REMUS, Trustee for
SUPERIOR METAL SHREDDERS, INC.,
Plaintiff-Appellant,
March 6, 1992

v

No. 133554

THE CITY OF KALAMAZOO,
a Michigan municipal corporation,
Defendant-Appellee.

Before Brenna, P.L., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Plaintiff through its bankruptcy trustee appeals as of right an order of the Kalamazoo Circuit Court granting defendant's motion for summary disposition. Plaintiff's sole issue on appeal is whether the circuit court erred by applying res judicata in barring its taking claim. We affirm.

After receiving complaints about nose, vibrations and pollution, defendant revoked plaintiff's license to operate its automobile shredder on December 16, 1980. Despite the revocation of its license, plaintiff continued to operate the shredder. Defendant then filed suit to enjoin plaintiff from operating the shredder without a license and to abate the nuisance. The circuit court issued a

temporary restraining order against plaintiff.

On December 23, 1980, plaintiff filed a counterclaim against defendant, alleging that defendant acted unreasonably and arbitrarily in revoking plaintiff's license and enforcing a city ordinance. Plaintiff's counterclaim further stated that as a result of the revocation of its license, plaintiff filed for bankrupt in federal court and that it would suffer irreparable injury if its license was not reinstated. The circuit court revoked the temporary restraining order and conditioned future operation of the shredder upon plaintiff's compliance with the conditions placed on the license.

After additional complaints from residents, the circuit court permanently enjoined plaintiff from operating the shredder on october 15, 1984. As part of that order, the circuit court dismissed with prejudice plaintiff's December 1980 counterclaim.

In September 1989, plaintiff filed the instant action against defendant, alleging that by virtue of the October 1984 permanent injunction, defendant had improperly taken plaintiff's property without just compensation as required by the federal and state constitutions. Following a hearing, the circuit court found that plaintiff's December 1980 counterclaim was essentially a taking claim. Since plaintiff's counterclaim was dismissed with prejudice, the circuit

court held that plaintiff's September 1989 complaint was barred by res judicata. Res judicata bars a subsequent suit between the same parties when the facts or evidence essential to the two suits are identical and the issues and parties or privies are identical. Ozark v Kais, 184 Mich App 302, 307; 457 NW2d 145 (1990). There are three prerequisites to applying the doctrine of res judicata: (1) the prior action must have been decided on its merit; (2) the issues raised in the second case have been resolved in the first; and (3) both actions must have involved the same parties or their privies. Richardson v DAHF, 180 Mich App 704, 708; 447 NW2d 791 (1989).

The first and third prerequisites for applying res judicata are met here. The circuit court dismissed with prejudice on October 15, 1984, plaintiff's counterclaim. An order dismissing an action with prejudice is a final judgment on the merits for the purpose of res judicata. Brownbridge v Michigan Mutual Ins.Co., 115 Mich app 745, 748; 321 NW2d 698 (1982). Both suits also involve the same parties. Richard Remes, as the bankruptcy trustee, stands in the shoes of the debtor corporation and has the right to bring whatever actions the debtor could bring on its own behalf. 9 Am Jur 2d, Bankruptcy, SS290, p 310. We believe that a trustee in bankruptcy has such an identification of interest with the debtor as to be in privy to represent the same

legal right as the debtor. Sloan v City of Madison Heights, 425 Mich 288, 295; 389 NW2d 418 (1986).

We next consider whether the taking issue could have been resolved in the prior action. Michigan courts have broadly interpreted the res judicata doctrine to hold that if the matter contested in the second suit could have been resolved in the first suit, but was not, res judicata bars the second suit. See Schwartz v City of Flint, 187 mich App 191, 194; 466 NW2d 357 (1991). Richardson, supra. Here, plaintiff could have filed a specific taking claim in its 1980 counterclaim, but did not. Thus, we hold that its taking claim in the instant suit is barred by res judicata.

We find no merit in plaintiff's argument that a taking claim became "ripe" only after the permanent injunction was issued on October 15, 1984. Plaintiff might have brought an action for a temporary taking after defendant revoked its license in 1980. See Poirier v Grand Blanc Twp. 167 Mich App 770, 777; 423 NW2d 351 (1988); lv den 431 Mich 913 (1988). Plaintiff's claim that the taking claim did not accrue until it filed for bankruptcy is equally meritless.

Affirmed.

/s/ Thomas J. Brennan
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

December 2, 1992

94118

RICHARD C. REMES, Trustee for
SUPERIOR METAL SHREDDERS, INC.,

Plaintiff-Appellant,
SC: 94118
v COA: 133554
LC: A89-002452-CC

THE CITY OF KALAMAZOO,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Inter-Office MEMO

City of Kalamazoo

To: Hon. Mayor Annen & City Commissioners
Date: November 21, 1979
From: Don M. Schmidt, City Attorney
Re: Superior Metal Shredders, Inc.

* * *

From the complaints that have been received from the neighbors, it appears the majority of the problems have not been solved and are still continuing, although it appears that there has been some improvement in the emission into the air of various materials, lessening of explosive occurrences, and a lessening in the level of vibration.

Another factor which you might wish to consider is that if Mr. Rosenberg is willing to invest money to solve these problems the loss of the tax exemption may make it more difficult for him to have the necessary funds to cure the operation of the metal shredder.

Respectfully submitted,

Don M. Schmidt
City Attorney

DMS:ws
cc: City Manager
City Clerk

EDISON CENTER
1331 RaceStreet, Kalamazoo
Michigan 49001 616/382-0916

August 11, 1980

To: Mayor Annen and Members of the City Commission

From: Edison Neighborhood Committee and E. Crosstown Pkwy. Block Club

Re: Proposed conditions of Recycling Dealers License for Superior Metal Shredder

If the license is reviewed, we recommend that the following stipulations be incorporated into the conditions proposed by Hearing Officer Martin (pages 15-17):

1. Hours of operation are irrelevant if Shredder is not creating a nuisance.
2. Acceptable as proposed by Deputy City Manager 8/7/80.
3. Acceptable as proposed by deputy City Manager 8/7/80.
4. The log referred to should be maintained on a daily basis.
5. Acceptable as proposed by the Deputy City Manager 8/7/80.
6. Acceptable as proposed by Hearing Officer Martin 6/23/80.
7. Veto: (#7 of Hearing Officer martin's report corresponds to #6 of Deputy City Manager Sculley's report.)
   a. The "regular ground vibration readings in the Crosstown Parkway neighborhood" should be conducted every week for an

eight-hour time period, with 300 vehicles processed. The City Manager should be provided with copies of all reports.

b. The maximum level of vibrations should be -60 dbgs, the level determined by Dr. Campanella to be the threshold of feeling.

We concur with the additional conditions recommended by the Deputy City Manager regarding payment of all outstanding taxes, fees, and bonds by August 13, 1980; and compliance with all State and City laws and ordinances.

We recommend that the City Commission add the following conditions:

9. The City Official charged with enforcement of this license shall be the Chief of Police.

10. The City Commission may immediately revoke this license unpon receipt of a verified complaint from the Chief of Police. This complaint, filed with the City Manager, must be presented to the City Commission within ten days.

11. Upon revocation of the Department of Natural Resources Permit to Operate, this recycling Dealers License shall automatically be repealed.

Basic Counselling
Allen Corp.
Senior Citizens
Emergency Services
Neighborhood Development

COUNTER-COMPLAINT IN STATE
1980 ACTION OF PETITIONER

* * *

7. That at said hearing Counter-Defendant unreasonably, arbitrarily and without any pretense of due process as that term is defined by Michigan and Federal Case Law revoked said license.

8. That this revocation is arbitrary, unjust, unreasonable and devoid of any reasonable relation to any objects or purposes which might be sought to be accomplished by said ordinance and is void and of no effect and violative of the Constitution of the State of Michigan and the Constitution of the United States of American and the Fourteenth Amendment thereto.

9. That the Counter-Defendants and their respective agents and employees and persons acting under their control and direction have attempted to enforce through this court and through other proceedings and threatened to attempt to enforce this ordinance the revocation of this license and to force and compel Counter-Plaintiff to cease operation of their business all in the utmost bad faith and for political motives and for political gain.

10. That Counter-Plaintiffs have incurred expenses in excess of One Million Dollars ($1,000,000.00) to bring a much needed service and operation to the City of Kalamazoo and despite the fact that the Counter-Plaintiffs have complied with all

reasonable requests of the City of Kalamazoo, that the Counter-Defendant has unreasonably and unjustly, arbitrarily and without cause harassed Counter-Plaintiff and caused the shut-down of Counter-Plaintiffs' business activities to the extent that the Counter-Plaintiffs have found it necessary to submit to Federal Bankruptcy Court for the purposes or corporate reorganization.

11. That the continued harassment and revocation of Counter-Plaintiffs' license will result in irreparable injury to Counter-Plaintiff in that Counter-Plaintiff will be forced out of business permanently due to Counter-Plaintiff's many outstanding obligations and Counter-Plaintiff's inability to operate without a license from the City of Kalamazoo.

12. That since Counter-Defendant has already revoked the license of Counter-Plaintiff and informed Counter-Plaintiff that said license will not be renewed until April, 1981, if at all, Counter-Plaintiff has no adequate remedy at law.

WHEREFORE, Counter-Plaintiff prays that this Court grant Counter-Plaintiff the following relief in favor of the Counter-Plaintiff and against the Counter-Defendant.

A. A preliminary and permanent injunction restraining the Counter-Defendant from further proceedings either in Court or administratively to enforce the revocation of Counter-Plaintiff license to operate a metal shredder or a

recycling dealership in the City of Kalamazoo.

B. A declatory Judgment declaring that the revocation of Counter-Plaintiff's license to operate a shredding machine and recycling dealership license was in violation of due process clause of the United States Constitution and the Michigan Constitution and therefore void and of no effect.

C. That this is a claim for general relief.

D. That the Court award to the Counter-Defendant costs and attorney fees regarding this matter.

DATED: December 23, 1980

MURPHY, BURNS & McINERNEY, P.C.
Attorneys for Defendants

By: Peter F. Walsh (P28040)
BUSINESS ADDRESS:
1000 Campau Square Building
180 Monroe, N.W.
Grand Rapids, MI 49503

SUPERIOR

Restrictions Recommended by City Hearing Office

	June 20, 1980	August 4, 1980
(1)	Hours of operation:	8:30 - 5:00 (M-F)
(2)	Rate of Process:	300 vehicles per 8 hour day
(3)	Maintenance:	regular, as indicated by daily inspection
(4)	Record log:	Hours of operation, inspection results
(5)	Materials:	Inspection for fuel tanks/removal
(6)	Materials:	Verification of fuel tank removal
(7)	Bear costs of vibration measurements (ground levels)	

SUPERIOR
Actual License Restrictions
August 13, 1980

(1) As recommended
(2) As recommended
(3) Addition - employ full-time millwright
(4) As recommended
(5) Addition - inspect for transmissions, driveshafts, etc.
(6) Addition - structural levels (e) cease operation if greater than 60 dbgs
(7) Provide all bonds, license fees, and taxes
(8) Fully comply with all Federal, State and Local laws
(9) Enforcement officer provided
(10) City may revoke on filing of complaint
(11) City may revoke should DNR revoke permit

SUPERIOR

Operational Incidents

Vibration Test: Passed August 13, 1980

Materials explosion - September 4, 1980
1) license revoked
December 9, 1980

Materials explosion - September 15, 1980

Vibration test: Passed October 30, 1980)

Vibration test: Passed November 17, 1980
2) Respondents State Court Original Action) Complaint filed December 17, 1980

Vibration test: Passed December 1, 1980
Materials explosion December 4, 1980

SUPERIOR

Restrictions of Preliminary Injunction
January 8, 1981
(Ex. 29)

(1) Same as license
(2) Same as license
(3) Same as license
(4) Same as license
(5) Same as license
(6) Same as license
(7) Same as license
(8) Same as license
(9) Deleted
(10) Deleted
(11) Deleted
(12) Addition: $10,000 bond
(13) Addition: $2,000 explosion bond

Successors Owner Original Restrictions In Order to Commence Operation of Shredder 1986

(1) Hours: 8:00 - 5:00 (M-F)
(2) Same as Superior license
(3) Same as Superior license
(4) Same as Superior license
(5) Deleted
(6) Same as Superior license
(7) Same as Superior license
(8) Same as Superior license
(9) Deleted
(10) Deleted
(11) Deleted
(12) Deleted
(13) Deleted

Successor Owner's Modified New hours of Operations as of June 5, 1986

(1) Hours: 8:00 - 6:00 (M-F)
10:00 - 6:00 (Saturday)
(36% INCREASE IN HOURS)
(a) Should breakdown occur, operate additional hour following day

(2) Same as previous order
(3) Same as previous order
(4) Same as previous order
(5) Same as previous order
(6) Same as previous order
(7) Same as previous order
(8) Same as previous order

SUCCESSORS
Operational Incidents

Vibration test: Passed May, 1986
Materials explosion: July 28, 1986
Vibration test: Passed August, 1986
Materials explosion: October 22, 1986
Vibration test: Passed November, 1986

Note: Vibration level increasing

Successor Owner's Actual License
Restrictions as of
December 5, 1986

(1) Same as previous order (36% increase in operating hours)
(2) Same as previous order
(3) Same as previous order
(4) Same as previous order
(5) Same as previous order
(6) Deleted
(7) Same as previous order
(8) Same as previous order

Transcript of new owner hearings - November 26, 1986

Important: Court Order dismissing suit - December 5, 1986

U.S. CONSTITUTION, AMENDMENT 5

. . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION
AMENDMENT 14

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONSTITUTION

ARTICLE 5,
Section 1. Full Faith and Credit

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

§1738. . . Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, ch 646, § 1, 62 Stat. 947).

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an actin at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S.§1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284.)